Supreme Court, U.S.
FILED
JUN 22 1994
OFFICE OF THE CLERK

(3)

No. 93-1786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GALIN CORPORATION AND PETROPAK, INC.,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORP.,
Respondent.

On Petition For A Writ Of Certiorari to the United States Court of Appeals For the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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TO THE UNITED STATES SUPREME COURT:

Petitioners Galin Corporation and Petropak, Inc., file this Reply Brief in response to the brief in opposition filed by the Respondent MCI Telecommunications Corporation.

Galin/Petropak feel compelled to respond to the accusations made by MCI in its brief in order to clarify the record in this case. The main gist of MCI's reply is not that the merits of Galin/Petropak's complaints are incorrect, but that Galin/Petropak did not present their complaints to the trial court, thereby waiving any error. Petitioners will address each of MCI's contentions in this regard and show that each is without merit. Petitioners will show that it is *MCI* who mischaracterizes the record, *not* Galin/Petropak.

1. Galin/Petropak did not discover MCI's intentional misrepresentations until after suit was filed.

MCI first accuses Galin/Petropak of making the "false statement" that the release in question could not have released MCI's "misrepresentations" concerning the presence of rock because Galin/Petropak were unaware of the facts concerning rock probes until the lawsuit was filed and discovery occurred, citing pages 19 and 20 of Petitioners' brief. *Resp.Br.2.* This is a misrepresentation of Petitioner's brief and of Petitioner's position in this case. Galin/Petropak assert at pages 19 and 20 of their brief that they were unaware of MCI's *intentional* misrepresentations until after the lawsuit was filed. *Pet.Br.19,20.* MCI conveniently omits the word "intentional" from its cite to Petitioner's brief.

Of course Galin/Petropak knew at the time of the excavation that they encountered rock in places where

MCI had expressly represented there was none. This goes without saying and is the guts of Galin/Petropak's lawsuit. What Galin/Petropak did not discover until after the lawsuit was filed and discovery was done, was that MCI *intentionally* misrepresented the data concerning the presence of rock; i.e., that MCI made false representations at a time when it knew, or should have known, that they were false. The evidence Galin/Petropak tendered and the court excluded was MCI documents showing that it would have been impossible to have done the rock probes in the amount of time they supposedly were done. *TR 22-23,25-27.*

MCI's position at trial was *not* that the fraud was discovered before the time of the release and that it was, therefore, released, but that any intentional misrepresentation was immaterial because of the contract provision requiring the contractor to inspect the premises and to assume the risk of loss of site conditions. *TR 21-22.* This was the basis for the trial court's exclusion of Galin/Petropak's evidence. *TR 21-27.* The fact that any risk of loss due to site conditions was placed on Galin/Petropak in the contract document does not, of course, excuse MCI's fraud for their express and knowing misrepresentation that they had rock probe tests done that indicated no rock. *See Young Fehlhaber Pile Co., Inc., v. State*, 177 Misc. 204, 30 N.Y.S.2d 192, 195 (Ct. Cl. 1941).

2. Galin/Petropak did seek avoidance of the release and of the notice provision in the contract.

MCI contends that Galin/Petropak did not seek relief at the trial court level to avoid the release and the notice provision in the contract. As this Court is aware, the release referred to was a standard partial payment release form signed by Galin/Petropak pur-

suant to the contract. The notice provision in the contract provided that claims for extra compensation were to be made within a certain time period. The trial court and the Fifth Circuit relied upon both the release and the notice provision in finding that Galin/Petropak had released or waived all of its claims against MCI.

It was Galin/Petropak's position at trial, as it is now, that the partial release relied upon by MCI was not effective to release Galin/Petropak's causes of action for several reasons. First, it was by its own terms a partial release, releasing only claims "based upon this Invoice for labor, material, equipment, subcontract work, and any and all costs Incurred for the performance of the contract work Invoiced thus far." *See* Respondent's Appendix A1. Second, MCI waived its right to rely upon the release by its actions and representations inconsistent with claiming such defense. Third, the work on which Galin/Petropak's claims were based were extracontractual and therefore not within the scope of the release. And fourth, the release was vitiated by MCI's fraud in inducing the contract in the first place.

Similarly, the notice provision was not a bar because MCI, by its conduct, waived its right to rely upon such provision, because Galin/Petropak's claims were for extracontractual work outside of the terms of the contract, and because MCI's fraud vitiated the contract.

All of these contentions were contained in the Amended Joint Pretrial Order filed by the parties. By MCI's own admission, Galin/Petropak states in the Joint Pretrial Order as one of their contentions in the lawsuit that "no document or conduct on the part

of Plaintiffs [Galin/Petropak] released Defendant [MCI] from any claim proffered in this lawsuit." *R 2225; Resp.Br.4.* This is later stated by *MCI* as one of the contested issues of fact. *R 2231.* Likewise, the Pretrial Order states that MCI's conduct deviated from the timetables in the contract and that it should be bound by such conduct. *R 2225.*

MCI makes the disingenuous argument, however, that Galin/Petropak did not allege any defense that would have avoided the release or the notice provision. *Resp.Br.5.* This contention flies in the face of the Pretrial Order. Galin/Petropak state clearly and unequivocally that no document or conduct on their part released MCI from their claims. *R 2225.* The order clearly states as a contested issue whether MCI's alleged acts and/or omissions constituted a waiver of its rights to rely upon the notice requirements for submitting claims under the contract. *R 2232.* Galin/Petropak also state in the Pretrial Order that MCI induced the contract by fraud, and that MCI's conduct vitiated the contract. *R2223-24.* The Pretrial Order states facts to establish waiver of the release and the notice provision by alleging that Galin/Petropak submitted their claims for extra compensation "at the request of MCI." *R 2218-19.* The Pretrial Order states that MCI made oral contracts for work outside of the written contract, in support of their contention that their claims were for extracontractual work. *R 2223.* Galin/Petropak state as a contested issue whether MCI's actions estopped them from relying upon the contract's provisions. *R 2231.*

The fact that perhaps best illustrates MCI's disingenuousness is that it agrees in the Agreed Propositions of Law to the definitions of "fraud" and

"waiver." *R 2231.* Yet it turns around and tells this Court that these defenses were not alleged by Galin/Petropak and therefore were not before the trial court.

MCI also states in its brief that Galin/Petropak did not allege the defenses of duress, lack of consideration, or ambiguity. *Resp.Br.5.* This is true, but immaterial, as Galin/Petropak has never claimed these defenses. Furthermore, it would have been difficult for Galin/Petropak to have claimed ambiguity of the release relied upon by MCI and the trial court, as such document was never referred to or identified by MCI in the Joint Pretrial Order. MCI only alleged generally that all claims after May 1988 were released by Galin/Petropak. *R 2221, 2226,2231.* It never states how this release took place.

Galin/Petropak's position on appeal remains the same. Petitioners do not contend that the release was ambiguous, but that it was limited, that it was waived, that it was vitiated by MCI's fraud, and that it did not cover extracontractual work.

3. Galin/Petropak did proffer evidence ensuring them the right to a jury trial.

MCI next takes the untenable position that Galin/Petropak waived any error by not proffering their evidence to the trial court. The record, however, is replete with repeated requests by Galin/Petropak to empanel a jury and to put on their live witnesses: "We are ready to go to trial, your honor." *TR 2;* "We are prepared to pick a jury and try this lawsuit." *TR 6;* "It's a question of fact for the jury to decide whether or not this was beyond the scope of the agreement to this work. And the testimony and doc-

umentary evidence is going to be it clearly was beyond the scope of the original agreement contemplated by the parties. . . ." *TR 74;* "We are ready to proceed with trial, your honor. . . .and we're prepared to put on testimony with regard to that. And short of that, we're prepared to make a bill or an offer of proof on everything that we would have presented in their case. And we would request that the court impanel a jury so that we could do that." *TR 87-88*; "Because we don't believe that this case is ripe for instructed verdict by any means at this point, there are still issues left we just talked about; contract amounts, for instance, and judge, we haven't put on any evidence and we haven't rested." *TR 95.*

And finally, "we would make a motion right now, we want to make an offer of proof on everything that the court has excluded." *TR 97-98.* To which the court replied, "I understand. And I appreciate that. And I am denying that." *TR 98.*

MCI argues that this request to make an offer of proof was ineffective because at that point the court had only excluded documentary evidence, which needed no further bill. MCI is wrong, however, because at that point the court had ruled that the release precluded evidence of all of Galin/Petropak's claims through the date of the release and granted MCI's motion in limine for all such evidence. *TR 87.* The court then refused to empanel a jury because of its ruling that precluded all of Galin/Petropak's claims. *TR 87-99.*

The fact that Galin/Petropak has had to speculate about the evidence they could have presented to the jury illustrates the *trial court's* error in speculating about the evidence and concluding without basis that

there was no evidence Galin/Petropak could have presented that would have defended against the release and the notice provision.

4. MCI's arguments regarding the constitutional issues.

The remainder of MCI's arguments simply piggyback its erroneous assumptions discussed above. MCI argues that Galin/Petropak was not entitled to a jury trial because the release precluded any fact finding, and because for the same reason any procedural error would be harmless. Galin/Petropak does not argue, however, that it would have been entitled to a jury, or that any procedural error would have been harmful, if in fact there were no factual issues raised by their pleadings and by the limited evidence that was admitted into evidence. Galin/Petropak's clear position is and always has been that there were fact issues raised by their pleadings and by the evidence, as shown above, and for that reason they were entitled to have a jury empaneled and to present such evidence. Galin/Petropak agrees with MCI that *undisputed* facts do not need to go to a jury.

5. The law on the merits.

Again, MCI uses the same erroneous assumptions discussed above to argue that Galin/Petropak's cases on the merits of their claims are inapplicable. MCI continues to argue that Galin/Petropak contended that MCI was guilty only of misrepresentation, and not of fraud. Even a cursory review of the Pretrial Order, as shown above, reveals that Galin/Petropak alleged intentional misrepresentation, i.e., fraud, on the part of MCI that was used to induce the contract. We can assume, then, that since MCI advances no other arguments against Galin/Petropak's position, that they

would agree that Galin/Petropak's position is otherwise correct.

The remainder of MCI's arguments assume that Galin/Petropak did not contend at trial that the release was waived or vitiated by fraud. Since Galin/Petropak has shown this to be untrue, we can again assume that MCI has no other arguments against Galin/Petropak's position.

CONCLUSION

The merits of Galin/Petropak's petition for certiorari being granted in this case is perhaps best illustrated by the weakness of MCI's response. All of MCI's arguments erroneously assume that Galin/Petropak did not challenge the release at trial. This is a ludicrous position in view of the parties' Joint Pretrial Order. The Pretrial Order clearly and specifically denies any release of Galin/Petropak's claims, and alleges the defenses of fraud, waiver, and extracontractual work. MCI poses no other justification for the trial court's improper actions in this case that resulted in Galin/Petropak being deprived of their right to a jury trial and to due process.

Respectfully submitted,

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